

ANNOYING AND ACCOSTING PERSONS OF THE OPPOSITE SEX

G.L. c. 272, § 53

The defendant is charged with accosting and annoying a person of the opposite sex.

In order to prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

First: That the defendant knowingly engaged in an offensive and disorderly act (or acts), or offensive and disorderly language;

Second: That the defendant intended to direct that conduct to [alleged victim] ;

Third: That [alleged victim] was aware of the defendant's offensive and disorderly conduct;

Fourth: That this conduct was offensive to a reasonable person; and

Fifth: That [alleged victim] was a person of the opposite sex.

To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt *either* that the defendant committed a disorderly act (or acts) *or* that (he) (she) used disorderly language.

To be disorderly, the defendant's act (or acts) or language must involve one of the following four things without a legitimate reason:

- it must involve fighting or violent or tumultuous behavior; *or*
- it must create a hazardous condition; *or*
- it must create a physically offensive condition that amounts to an invasion of personal privacy; *or*
- it must be threatening.

A threat may take many forms. It may be an explicit threat, a comment, or an act that would make a reasonable person fearful, not just uncomfortable. The Commonwealth is not required to prove that the defendant intended any threat to be immediately followed by actual violence or the use of physical force. You may consider all of the evidence and any reasonable inferences you choose to draw from the evidence to determine whether any act or language was reasonably viewed as truly threatening.

SUPPLEMENTAL INSTRUCTION

If sexually explicit language is involved.

Sexually explicit language may be inherently threatening when it is directed at particular individuals in settings in which such communications are inappropriate and likely to cause severe distress.

“The term ‘true threat’ has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit.” *Commonwealth v. Chou*, 433 Mass. 229, 741 N.E.2d 17 (2001). See *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 21-22, 865 N.E.2d 1158, 1167-1168 (2007) (defendant staring at complainant at swimming pool and singing her a song about “falling in love with a little girl” insufficient to infer that he intended her to fear that harm would befall her). See *Chou*, *supra*.

To prove the second element, the Commonwealth must prove that the conduct was directed at and received by the [alleged victim] .

To prove the third element, the Commonwealth must prove that [alleged victim] knew of the defendant’s offensive and disorderly conduct.

To prove the fourth element of the offense, the Commonwealth must prove beyond a reasonable doubt that the disorderly act(s) or language would be offensive to a reasonable person in the complainant’s position. An act or language is offensive when it is repugnant or offensive to contemporary standards of decency and causes real displeasure, anger, or resentment. An act or language is offensive when it is contrary to the prevailing sense of what is decent or moral.

Commonwealth v. Cahill, 446 Mass. 778, 781 & 783, 847 N.E.2d 344, 346 & 348 (2006) (Commonwealth must prove that defendant’s behavior was offensive and disorderly to a reasonable person).

NOTES:

1. **Offensive and disorderly are distinct elements.** The Commonwealth must prove both that the conduct was offensive and disorderly. *Commonwealth v. Lombard*, 321 Mass. 294, 73 N.E.2d 465 (1947).

2. **A single act sufficient.** The statute originally penalized “persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex.” In 1983, the word “act” was changed to “acts.” St. 1983, c. 66, § 1. Nevertheless, “the change had no impact on the statute’s meaning,” *Commonwealth v. Moran*, 80 Mass. App. Ct. 8, 13, 951 N.E.2d 356, 360-361 (2011), and proof of a single disorderly and offensive act is sufficient.

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3. **Invasion of privacy need not be extreme.** The word “extreme” was deleted from this instruction after the decision in *Commonwealth v. Cahill*, 446 Mass. 778, 782, 847 N.E.2d 344, 347 (2006) (statute not limited to extreme invasions of personal privacy), rev’g *Commonwealth v. Cahill*, 64 Mass. App. Ct. 911, 834 N.E.2d 1238 (2005).

4. **“Physically offensive condition.”** If the act was physically offensive, it need not also be threatening, *Cahill*, 446 Mass. at 783, 847 N.E.2d at 348, and vice versa, *Commonwealth v. Chou*, 433 Mass. 229, 741 N.E.2d 12 (2001) (distribution of sexually derogatory flyers concerning victim was not physically offensive but was threatening).

“Offensive acts are those that cause ‘displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.’” *Cahill*, 446 Mass. at 781, 847 N.E.2d at 346, quoting Black’s Law Dictionary 1113 (8th ed. 2004). Conduct is physical when it is “of or relating to the body.” *Ramirez*, 69 Mass. App. Ct. at 17, 865 N.E.2d at 1164-1165. Physical contact with a victim’s person is not necessary to render one’s actions physically offensive, however. *Id.*, citing *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 548, 666 N.E.2d 152, 156 (1996) (physically offensive conduct where defendant removed screen from bedroom window of ground floor apartment wherein woman lay sleeping and stood there smoking cigarettes). Cf. *Ramirez*, *supra* (no physically offensive conduct where defendant merely stared at complainant at swimming pool and sang her a song about “falling in love with a little girl”).

5. **Public or private.** The offense may be committed in public or in private. *Cahill*, 446 Mass. at 782 n.6, 847 N.E.2d at 347 n.6; *Chou*, *supra*.